The construction of an undertaking given in an anti-suit injunction (Quadra Commodities v International Bank of St Petersburg)

This analysis was first published on Lexis®PSL on 12 April 2021 and can be found here (subscription required)

Dispute Resolution analysis: This case concerned the construction of an undertaking given by the claimants in the context of an anti-suit injunction. The claims and counterclaims were pursued thereafter in arbitration proceedings in London, and an issue subsequently arose between the parties as to the interpretation of the undertaking previously given. That issue was whether the effect of the proviso to the undertaking was such that the defendants were restricted in the arguments it could present to the arbitral tribunal or, whether the tribunal's approach to the arguments, was circumscribed by the proviso. In this instance, given the rationale behind the undertaking, even had concessions not been made, the judge would not have construed the undertaking as either fettering the arguments to be heard, or the approach to be taken by the tribunal. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Quadra Commodities SA & others v International Bank of St Petersburg (Joint Stock Company) [2021] EWHC 623 (Comm)

What are the practical implications of this case?

While this was a case which very much turned on its own facts, it gives a helpful overview of the considerations a court will have regard to when interpreting the construction of an undertaking in the context of an anti-suit injunction case.

The case also highlights that such undertakings can avoid a very real problem in anti-suit cases. In this instance, it was said that the undertaking given sought to avoid the argument that, in essence, a court should not grant an anti-suit injunction if its effect would be to prevent the pursuit of a claim in Russia under Russian bankruptcy law, with the result that there would be no 'home' for that claim at all. The effect of conferring jurisdiction on the arbitral tribunal was to provide such a home for the claim. The proviso in this instance was accordingly to be construed as preserving the claimant's position to make whatever arguments it wished to make as a matter of law, but not to fetter either the defendant or the tribunal. The substance of the undertaking was essentially the same as it was in *RiverRock Securities Ltd v International Bank of St Petersburg (joint stock company)* [2020] EWHC 2483 (Comm), which was the effect that the undertaking should have had.

Consequentially, where undertakings are given in order to avoid the potential argument that there was a strong reason to allow proceedings elsewhere to continue and to instead confer jurisdiction on arbitrators, absent clear wording, it appears unlikely that such an undertaking would fetter the discretion of subsequently appointed arbitrators.

What was the background?

The issue before the court was how to interpret an undertaking which was given by the claimants in the context of an anti-suit injunction. The background to the dispute was the validity of certain discharge agreements which were concluded between the claimants and the defendant bank, which subsequently entered into liquidation. In broad summary, the claimants wished to uphold the validity of those agreements which, in practical effect, would mean that no further monies were owed to the defendant. The defendant wished to argue to the contrary, and brought proceedings in Russia, relying upon certain provisions of Russian bankruptcy law, referred to in the undertaking. They were effectively stopped by the anti-suit injunction granted by the English High Court.

The claims and counterclaims thereafter were pursued in arbitration proceeding in London, and issues subsequently arose as to the meaning and effect of paragraph 8 of the undertaking in the

context of the claims and counterclaims advanced in that arbitration. Those issues led to the present application for declaratory relief as to the effect of the undertaking and the proviso.

At the time of the hearing, the defendant's position was that there was no fetter at all on the arguments which the claimants could advance in support of their case at the arbitration in respect of both its claim and counterclaim, nor was there any fetter on the arguments that the defendant could deploy. It was said that the potential argument which the undertaking sought to avoid was, in essence, that the court should not grant an anti-suit injunction if its effect would be to prevent the pursuit of a claim in Russia under Russian bankruptcy law, with the result that there would then be no 'home' for the claim at all.

The claimant contended that the position of the defendants had been fluid; initially contending that the effect of the undertaking was that the claimant was in some way precluded from making certain arguments as to how the tribunal should resolve the counterclaim. In particular, it was submitted that the defendant was arguing that the impact of the undertaking was that the claimant had to accept the counterclaim was to be exclusively determined by reference to Russian law.

The question for the judge to determine was, or at least appeared to be, whether the effect of the proviso was to limit the circumstances in which the arbitrators' jurisdiction arose; either because the defendant was restricted in the arguments that is could present to the tribunal , or because the tribunal's approach was dictated by the proviso to the undertaking.

What did the court decide?

The judge considered that, when the application was first made, the order sought did unquestionably seek to fetter the points which the defendant could put before the arbitrators in relation to the counterclaim. That was the clear import of the draft order which was attached to the original application notice in November 2002. Subsequent to the making of the application and prior to its determination, there was a further hearing on the question of whether the defendant should be debarred from making submissions on the substantive hearing of the application. After the judge gave his views on this point, a further revised draft order was submitted which still, to some degree, sought to fetter the approach which the defendant could take to the arguments which it could advance, as well as the approach which the tribunal could take in relation to how it approached the issues.

During the course of submissions, counsel for the claimants essentially put forward a revised position, such that the claimants were no longer seeking to fetter the arguments which the defendant could advance in support of its counterclaim, and were no longer seeking to prescribe the approach which the arbitrators should take in its determination of the counterclaim. Even had that not been the approach ultimately taken, the judge considered that he would not have upheld the position that the claimants had been initially advancing.

In particular, the judge considered that the reason for paragraph 8 of the undertaking was to deal with the same point which was raised in the case of *Riverrock Securities Ltd v International Bank of St-Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm). This was a point considered by the judge dealing with the injunction, namely, that if the effect if the anti-suit injunction would be to eviscerate a claim which was available in Russia but not in England, that potentially might be a strong reason for not granting anti-suit relief. The judge did not have to resolve that issue in the Riverrock case because an undertaking, rather simpler than the one that was given in this case, was given (see News Analysis: Anti-suit injunction—arbitrability of foreign insolvency claims (RiverRock Securities v International Bank of St Petersburg)).

The undertaking in *Riverrock* had the effect of conferring jurisdiction on the arbitral tribunal, thereby enabling the relevant claim to be determined on its merits within the arbitration proceedings. That was also the essential reason why the undertaking in the present case was made. Given that this was the reason for the undertaking, the judge was not attracted to a construction of the proviso which had the effect of introducing significant limitations on the jurisdiction of the arbitrators to determine the counterclaims on the merits by reason of an approach which postulated that the arbitrators' jurisdiction only arose in limited circumstances; whether by constraining the arguments which the defendant could advance, or otherwise. It was also seemingly not the intention of the judge based

upon the arguments put forward at the injunction hearing to in any way fetter the jurisdiction of the arbitral tribunal.

The judge accordingly construed the first lines of the undertaking as preserving the claimant's position to make whatever arguments it wished to make as a matter of English law but not to fetter either the defendant or the tribunal. That meant that the substance of the undertaking was essentially the same as it was in *Riverrock*, which was the effect that the undertaking should have had. The question of whether there had been a breach of the injunction was rendered an academic exercise, and one which was unsuitable for declaratory relief.

Case details:

- Commercial Court (Queen's Bench Division), Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Justice Jacobs
- Date of judgment: 12 March 2020

Georgia Whiting is a barrister at 4 King's Bench Walk, and a member of LexisPSL's Case Analysis Expert Panels. If you have any questions about membership of these panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.